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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 776

LYMAN P. RHODES, JR., PETITIONER

versus

METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,

And

ACCOMPANYING BRIEF IN SUPPORT THEREOF

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LYMAN P. RHODES, JR., PETITIONER

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METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Lyman P. Rhodes, Jr., for review by this Court on writ of certiorari of a judgment and decree of the Circuit Court of Appeals for the Fifth Circuit rendered February 1, 1949 (R. 178) (see *Rhodes vs. Metropolitan Life Insurance Company*, Fifth C.C.A., 172 F. 2nd 183, Fed. Rep. 2nd Advance Sheets for March 14, 1949), wherein rehearing was denied March 31, 1949, (R. 195), with respect, represents that:

1.

PROVISIONS OF FEDERAL CONSTITUTION, FEDERAL STATUTES AND LOUISIANA STATUTES INVOLVED.

The following provisions of the Constitution of the United States, of the Statutes of the United States, and of the Statutes of Louisiana, are involved in this application:

Seventh Amendment to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 34 of the Judiciary Act of September 24, 1789, 1 Stat. at L. 92, Ch. 20, 28 U.S.C.A., Sec. 725:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Act 227 of the Legislature of Louisiana for the year 1918, Sec. 2:

> "Sec. 2. That every policy of insurance issued or delivered within the State on or after the first day of January, nineteen hundred and seven, by any life insurance corporation doing business within the State shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are endorsed upon or attached to the

policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties, and no statement or statements not endorsed upon or attached to the policy when issued shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be endorsed upon or attached to the policy when issued. Any waiver of the provisions of this section shall be void."

2.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner, Lyman P. Rhodes, Jr., respectfully presents the following facts, to-wit:

First: On June 19, 1947, Jacob M. Dampf and plaintiff, business partners, applied for and obtained reciprocal policies with Metropolitan Life Insurance Company, each being named as beneficiary and owner of a policy insuring the life of the other for $20,000.00 (R. 2, 5, 15-C). The right to change the beneficiary was not reserved; plaintiff was the designated "owner" of the policy and had a vested interest therein (R. 154-157); the policies were business policies. The full premium due under each policy was paid (R. 2, 5). Mr. Dampf had other policies insuring his life totalling $25,000.00 with other persons, members of his family, named as beneficiary (R. 158); one such policy for the face value of $5,000.00 had previously been issued by respondent herein.

Second: Shortly after midnight on September 10-11, 1947, Jacob M. Dampf died suddenly of coronary thrombosis in the

fifty-third year of his life. (R. 2, 5, 15-A). Due proof of death was made to the defendant on or prior to September 30, 1947; defendant denied liability and suit followed (R. 2, 5, 6). Respondent in its answer contended that certain questions claimed to have been answered by the late Mr. Dampf in his application for the policy sued on, touching his past medical history, were answered fraudulently and falsely by Mr. Dampf, and the answer charged (Paragraph 7) that "These answers, and each of them, were all false and fraudulent, and were known by the said Dampf to be false and fraudulent at the time he made same, and that said answers were made by him for the purpose of deceiving defendant as to the true condition of his health in order to secure the issuance of said policy, which said policy would not have been issued had the true facts been disclosed to defendant." (R. 8).

Third: At the close of the evidence the Judge on motion of defendant, respondent, directed a verdict in its favor, and overruled the plaintiff's motion for a directed verdict in his favor (R. 120-123; 127). Much evidence offered by petitioner had been excluded (R. 15-C, 73-76, 77, 93, 95, 103, 104, 106, 108, 111, 112, 114, 116).

Fourth: The matters allegedly fraudulently concealed by Mr. Dampf were that he had consulted and been treated by Dr. E. K. Hirsch on February 28, 1947, March 5, 1947, March 19, 1947, and March 25, 1947, had been told by Dr. Hirsch that he had sugar in his urine and blood, and had been told by Dr. Hirsch that he had diabetes (R. 8).

Admittedly, the matters allegedly fraudulently concealed by Mr. Dampf had nothing whatever to do with his death; counsel for respondent so stated in his opening statement (R. 15-A).

Petitioner offered the policy, testified as to his identity, and rested his case (R. 15-B-19). Respondent then assumed the burden of proving the charges in its answer that the answers Mr. Dampf had given were false and fraudulent and known by him to be false and fraudulent, and had been made by him for the purpose of deceiving defendant as to the true condition of his health. There was no testimony whatever to the effect that Mr. Dampf's answers had been made fraudulently, and for the purpose of deceit. In fact, the Fifth Circuit Court of Appeals specifically refused to base its decision on fraud.

Dr. E. K. Hirsch, who repeatedly refused to qualify or testify as a medical expert (R. 32, 43, 45, 49), was respondent's main witness. He said that he saw Mr. Dampf on July 9, 1945, for a complaint of frequency and burning on urination (R. 31); he did not see Mr. Dampf again professionally (although they visited socially) until February 28, 1947, when Mr. Dampf had a complaint of boils (R. 31). Dr. Hirsch examined Mr. Dampf's urine and found sugar (R. 32), suggested a diet and certain home tests for sugar which the insured could himself make, and believed that Mr. Dampf had diabetes (R. 33, 34). He told Mr. Dampf that about March 5, 1947 (R. 34), and asked Mr. Dampf to continue to test his urine at home (R. 35). These tests were made and turned in to Dr. Hirsch. They showed that the trace of sugar almost immediately disappeared, and on March 19, 1947, when Dr. Hirsch saw Mr. Dampf for the third time in 1947, the urine was sugar free (R. 37). Dr. Hirsch again saw Mr. Dampf March 25th; there was no sugar in his urine (R. 37, 47). Mr. Dampf did not return to Dr. Hirsch thereafter. Accordingly the doctor saw Mr. Dampf on four occasions in 1947, beginning February 28,

1947, and ending March 25, 1947. Mr. Dampf was never hospitalized, saw no other doctor, was never confined to bed, and lost no time from his duties.

In a written statement submitted to respondent as part of the Proofs of Death, and offered in evidence as exhibit D-12 by the defendant, Dr. Hirsch specifically stated that Mr. Dampf had been sugar free since March 25, 1947, that the illness had not been of long duration, and that there were no findings (R. 173).

On June 19, 1947, Mr. Dampf was examined by a Baton Rouge doctor, Dr. Joseph J. Noto, Medical Examiner for respondent (R. 60). He was accepted and passed by Dr. Noto. Dr. Noto was not called as a witness by respondent. Before the policy was issued, a specimen of Mr. Dampf's urine was sent to the Home Office of respondent for analysis, and was found to be negative (R. 60, 61). A lay investigation into Mr. Dampf's condition of health, financial condition, habits, etc., was conducted by respondent with favorable results (R. 70). An Agent's Inspection Report on Mr. Dampf by respondent's local agent was favorable (R. 66).

Petitioner offered testimony of numerous persons, close associates of Mr. Dampf, to prove that at the time this policy was applied for and delivered the actions, conduct, and words of Mr. Dampf, the manner in which he lived and acted, indicated that he did not believe he was ill but indicated on the contrary that he was in good health, and that the matter about which he had consulted Dr. Hirsch in February and March of 1947, was a mere passing ailment and temporary, which no one looked upon as serious (R. 94). The Trial Court refused to admit any of the evidence (R. 95, 103, 104, 106, 108, 111); this was challenged as error in the Circuit Court of Appeals and not mentioned by that Court in its opinion. The Trial

Court did admit evidence as to Mr. Dampf's known good character and reputation; this evidence was uncontradicted. Despite the action of the Trial Court in sustaining every objection made by counsel for respondent respecting lay testimony as to Mr. Dampf's physical condition and as to his conduct, appearance, actions, and state of mind as evidenced thereby, some testimony touching those points did get into the record; it was all to the effect that Mr. Dampf thought he was completely well and healthy (R. 91-93, 111, 113).

Respondent's non-expert witness Dr. Hirsch testified that sugar in the urine could be due to various causes, not necessarily to diabetes (R. 33, 49).

Dr. Albert O. Jimenis, associate medical director of respondent, testified that respondent did not insure diabetics (R. 57, 58); however, he made it clear that the statement of one local physician that a man was a diabetic was not always accepted as correct by respondent, and that respondent usually had such an alleged condition checked by its field examiner (R. 57), (which was done in this case, as well as having a urinalysis made in the respondent's home office).

At the close of all the evidence petitioner moved for a directed verdict in his favor on the ground that defendant had failed to sustain the burden it assumed of proving, by a preponderance of the evidence, that the answers given by Mr. Dampf in his application were false and fraudulent and known by him at the time to be false and fraudulent, and were made for the purpose of deceiving respondent as to the true condition of his health in order to secure the issuance of the policy; and further on the ground that there was no causal connection whatever between the alleged condition allegedly fraudulently concealed by Mr. Dampf, and his death (R. 117, 119-120).

Respondent moved for a directed verdict in its favor asking that the policy be declared null and void "by reason of fraud on the part of Jacob M. Dampf" (R. 119).

The Trial Court overruled petitioner's motion and granted respondent's motion (R. 127).

Fifth: Appeal was taken to the Fifth Circuit Court of Appeals by petitioner, wherein numerous specifications of error were alleged, including error in admitting some of respondent's evidence and rejecting evidence offered by petitioner, error in permitting Dr. E. K. Hirsch to testify over objection, and error in overruling petitioner's motion and granting respondent's motion. One of the Judges of the Appellate Court considered it advisable or necessary to write a concurring opinion.

The Circuit Court of Appeals, with one Judge writing a concurring opinion in which apparently he changed his mind about the substantive law of Louisiana (R. 185), affirmed the judgment (R. 185). The Appellate Court did not notice any of the specifications of error respecting rejection of evidence, but mentioned only the question of whether or not Dr. Hirsch should have been permitted to testify over the objection that his testimony would derive from privileged communications, and the question of whether or not the Trial Court erred in directing the verdict for respondent at the close of the trial (R. 179).

In its opinion the Circuit Court of Appeals specifically declined to find Mr. Dampf guilty of fraud. Fraud had been charged by respondent in its answer, and respondent's motion was squarely bottomed on this charge of fraud (R. 119). But the Circuit Court of Appeals based its opinion on the propo-

sition that, even in the absence of fraud, and even admitting the good faith of Mr. Dampf, if facts thought by the Court to be material were not disclosed in the application for insurance and if respondent produced testimony to the effect that it would not have issued the policy if that fact or those facts had been disclosed, as a matter of Louisiana law the policy is vitiated. The Appellate Court specifically refused to take into consideration the fact that the alleged matter allegedly fraudulently concealed had nothing whatever to do with the death of Mr. Dampf.

With all due respect to the Appellate Court, we submit that the law of Louisiana does not support its decision, but rather a contrary result.

Sixth: After his petition for rehearing was denied (R. 195), petitioner instituted this proceeding to secure a review and reversal of the judgment of the Circuit Court of Appeal, and to establish that the Appellate Court failed to determine and apply substantive law of Louisiana, and erred in rejecting admissible evidence, and has deprived petitioner of his right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States.

3.

JURISDICTIONAL STATEMENT

1. The jurisdiction of this Court is invoked pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 U.S.C.A., Title 28, Section 344.

2. The date of the original judgment of the Circuit Court of Appeals sought to be reversed is February 1, 1949; (R. 187); petition for rehearing was filed in that Court on February 17,

1949, within the time prescribed by the Rules of the Fifth Circuit Court of Appeals (R. 188); the petition for rehearing was denied without opinion on March 31, 1949 (R. 195); on April 11, 1949, the issuance of the Mandate was ordered stayed for thirty days from said date.

3. Petitioner invokes the jurisdiction of this Court on the ground that in holding that even though the insured was not guilty of fraud and was acting in good faith, and even though the alleged condition allegedly concealed had no causal connection whatever with the death of the insured, nevertheless as a matter of Louisiana law the policy was invalid, the Circuit Court erred; this holding is directly contrary to the decisions of the Louisiana Supreme Court, and the Circuit Court of Appeals has thus decided an important question of local law in a way directly in conflict with applicable local decisions. Furthermore, the jurisdiction of this Court is invoked on the ground that in affirming the direction of verdict for respondent, the Circuit Court of Appeals deprived petitioner of the right to trial by jury as guaranteed to him by the Seventh Amendment to the Constitution of the United States, thereby deciding a Federal question in a way which conflicts with the Constitution of the United States and with the applicable decisions of this Court.

4.

QUESTIONS PRESENTED

The following questions are presented in the case at bar, in which the jurisprudence of Louisiana was applicable since jurisdiction of the District Court rested on diversity of citizenship:

1. In failing to apply the principles of Louisiana law as announced by the Louisiana Supreme Court and particularly in the case of *Valesi v. Mutual Life Insurance Company of New York* (La. Sup. Ct. 1/30/22, reh. den 3/27/22) 91 So. 818, 151 La. 405, did the Fifth Circuit Court of Appeals err in concluding that in the absence of fraud, and absent any causal connection between death and the alleged condition allegedly fraudulently concealed, nevertheless the insurance policy was invalid?

2. In failing to apply Louisiana law to the effect that in the absence of such causal connection and in the absence of fraud, the policy was valid, did the Fifth Circuit Court of Appeals err in failing to order entry of judgment for petitioner on his motion?

3. Even if petitioner was not entitled to a directed verdict in his favor, in approving the direction of verdict for respondent, did the Fifth Circuit Court of Appeals deny petitioner the right to trial by jury guaranteed to petitioner by the Seventh Amendment to the Constitution of the United States?

4. In failing to notice the errors relating to admission of and rejection of evidence, which errors if corrected might reasonably change the result, did the Circuit Court of Appeals err?

5.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The law of Louisiana is perfectly plain and clear to the effect that in the absence of any causal connection between the matter allegedly fraudulently concealed and the death of

the insured, a false answer or answers given by an insured in an application for life insurance will not vitiate the policy unless the insured was guilty of actual fraud. The case of *Valesi v. Mutual Life Insurance Company of New York*, supra and infra, squarely so holds.

Respondent full well realized that such is the law of Louisiana, for the very answer of respondent specifically charged that Mr. Dampf was guilty of fraud with intent to deceive (R. 8). The written motion for a directed verdict filed by respondents concluded with this statement:

> "Therefore, this policy must be declared null and void by reason of fraud on the part of Jacob M. Dampf, in the inception of the insurance contract" (R. 119).

And yet the Circuit Court of Appeals has specifically refused to determine the question of fraud vel non. Said the Circuit Court:

> "Whether false answers knowingly made are fraudulent, as a matter of law, we need not now decide. It is sufficient, if admitting the good faith of the insured, the evidence establishes misrepresentation of a material fact of such import that had the truth been revealed the policy would not have been issued. Assuming that the insured was not guilty of fraud but was acting in good faith, the decisive question is whether the misrepresentations were material to the risk." (R. 184).

This is directly contrary to the law of Louisiana as expressed by the Louisiana Supreme Court. The statement of the Circuit Court of Appeals above stated would be in accord with the law of Louisiana, if, and only if, the alleged condition allegedly concealed had contributed to or caused the death.

It is now and always has been the law of Louisiana that in the absence of any causal relationship between death and the condition concealed or not disclosed in the application for life insurance, the policy would be vitiated because of such concealment or non disclosure only if there was actual fraud on the part of the insured.

And it is now and always has been the law of Louisiana that fraud is never presumed; that the burden of proving fraud is on him who alleges it; and that even if there is strong evidence of fraud, whether or not there was actual fraud in a life insurance case or any other type of case is a question of fact for the triers of the facts, and not a question of law.

In addition to the failure of the Circuit Court of Appeals to determine and follow Louisiana Law, the Circuit Court took unto itself the right to conclude that the insurance company, respondent herein, would not have issued the policy in question if different answers had been given. Under Louisiana jurisprudence that is a question of fact; not law. The testimony of respondent's associate medical director was somewhat vague to say the least; but if the full page advertisement of this respondent published in the Saturday Evening Post (which was offered by petitioner and excluded (R. 73-76) is considered, the very least that can be said is that the publication of this respondent creates an inference directly contrary to the testimony of its associate medical director. Since this advertisement was excluded, in order that Your Honors may see its import, it has been reproduced and a copy is found at the end of this petition and brief as Appendix-A. A similar advertisement, in another publication, is also found as Appendix-B. Appendix-B was not offered for the reason that it would have been futile to do so since Appendix-A was excluded.

In the case of *Cunningham v. Pennsylvania Mutual Life Insurance Company* (La. Sup. Ct. 11/27/22, reh. den. 1/27/23) 95 So. 110, 152 La. 1023, the Louisiana Supreme Court sitting as a trier of the facts squarely stated that it was not obliged to accept and it specifically did not accept the uncontradicted testimony of a head medical director of the defendant company in that case to the effect that he would not have approved the application for insurance had he known the facts which were allegedly fraudulently concealed.

We therefore submit that since there was no causal connection between the matter allegedly concealed in this case and the death, it was essential to respondent's defense under Louisiana law to prove fraud; and that either petitioner's motion for a directed verdict in his favor should have been granted on the ground that fraud had not been proved by a preponderance of the evidence, or at least the matter should have been submitted to a jury. We further submit that the question of whether or not respondent would have rejected this policy if the answers in the application for insurance had been otherwise, is under Louisiana law a question of fact for triers of fact. This is certainly true if the widely circulated advertisements of this respondent are considered, as they should have been and should be, for the very least that can be said is that those advertisements plainly show that respondent believed and published the statement that "in many mild cases, especially when diabetes is discovered early, correct diet alone can control the disease." (Quoted from Appendix-A).

6.
CONCLUSION

Applicant alleges that the rules of this Court have been fully complied with.

Wherefore, for the reasons stated herein, it is respectfully submitted by petitioner that this case is one calling for the exercise by the Court of its discretionary powers, in order that the errors herein pointed out may be corrected; in order that petitioner may not be deprived of his constitutional right to trial by jury; and in order that justice may be done. And to such ends, petitioner respectfully submits that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit and finally should reverse it, and either should enter verdict in favor of petitioner on his motion for a directed verdict in his favor, or should remand the case with instructions for judgment to be entered on petitioner's motion for a directed verdict in his favor, or should remand the case with instructions for trial to a jury under appropriate instructions respecting Louisiana law, and with proper rulings on admission of and rejection of evidence.

LYMAN P. RHODES, JR., Petitioner

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF JURISDICTIONAL GROUNDS

A concise statement of the grounds on which the jurisdiction of this Court is invoked will be found in the preceding petition at pages 9-10.

STATEMENT OF THE CASE

A concise statement of the case containing all that is material to the consideration of the questions presented with appropriate page references to the printed record will be found in the preceding petition at pages 3-9.

SPECIFICATIONS OF ASSIGNED ERRORS

A specification of the questions involved and of the errors attributed to the Circuit Court of Appeals which are intended to be urged before this Court will be found in the preceding petition at pages 10-11, as required by paragraph 2 of Rule 38.

ARGUMENT

QUESTIONS 1. AND 2.

There are two facts in this case which transcend all others.

One is that the matters about which Mr. Dampf consulted Dr. Hirsch some three months or so before he applied for the policy in question, had nothing whatever to do with his death.

The second is that Mr. Dampf was not shown to have been guilty of active fraud with intent to deceive, but was shown to have been in entire good faith; and indeed the Appellate Court specifically by-passed the question of fraud.

That *Erie Railroad Company vs. Tompkins* (4/25/38) 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, requires a determination of Louisiana law and an application of Louisiana law to this case, is now beyond dispute.

What is the law of Louisiana on this subject?

It was definitely and positively announced by the Louisiana Supreme Court in the year 1922, and has been the law of Louisiana ever since.

The Louisiana Supreme Court squarely stated in unequivocal terms that misrepresentations would vitiate the policy only (1) if they amounted to a fraud or (2) if the matters concealed or not disclosed had causal connection with the death.

We refer to the case of *Valesi vs. Mutual Life Insurance Company of New York* (1/30/22, reh. den. 3/27/22) 91 So. 818, 151 La. 405. The opinion of the Court was delivered by Justice Dawkins, then a member of the Louisiana Supreme Court, now and for many years in the past the presiding Judge in the United States District Court for the Western District of Louisiana.

In that case, Mrs. Valesi, beneficiary, sued on a policy of life insurance covering the life of her husband. The defense was suicide within the contestable period, and fraudulent misrepresentation of the insured in his application as to the use of intoxicants but for which the policy would not have been issued. Plaintiff had judgment in the lower Court and this was affirmed by the Louisiana Supreme Court.

The Court discussed Act 52 of 1906 of Louisiana as amended by Act 227 of 1916, providing that "all statements

purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties" in dealing with the question of alleged fraudulent misrepresentation by the insured. And the Court specifically said that a misrepresentation would vitiate a policy only if the matter concealed or not disclosed or misrepresented contributed directly to the death of the insured, or if it was fraudulent. Said the Court:

> ". . . the same (i. e., false answers) would have the effect of a warranty and vitiate the policy only if he concealed the true facts in such a manner as to amount to a fraud or in case the misrepresentation contributed directly to the death. . ."
>
> (Words in parentheses supplied).

Further, the Court said:

> "Conceding that they [i. e., answers in the application] were false but not fraudulently so, this would not defeat recovery (being considered as representations) unless the use of intoxicants had contributed in some way to his death; which we find was not the case in this instance." (Words in brackets supplied).

The authority of the *Valesi* case has never been abrogated.

The Fifth Circuit Court of Appeals cited the following Louisiana Supreme Court decisions, which are listed in chronological order:

> *Cole v. Mutual Life Insurance Company* (11/13/11, reh. den. 12/11/11), 129 La. 704, 56 So. 645;
>
> *Goff v. Mutual Life Insurance Company* (6/13/12) 131 La. 98, 59 So. 28;
>
> *Lee v. New York Life Insurance Company* (1/6/19, reh. den 2/3/19) 144 La. 445, 80 So. 652;

Valesi v. Mutual Life Insurance Company of New York (1/30/22, reh. den. 3/27/22) 151 La. 405, 91 So. 818;

Cunningham v. Penn Mut. Life Insurance Company (11/27/22, reh. den. 1/27/23) 152 La. 1023, 95 So. 110;

Carroll v. Mutual Life Insurance Company of New York (6/17/29, reh. den. 7/8/29), 168 La. 953, 123 So. 638;

Mutual Life Insurance Company of New York v. Rachal (1/6/36, reh. den. 3/2/36) 184 La. 430, 166 So. 129.

Recovery was allowed on the policy in every case above cited except that of *Lee v. New York Life Insurance Company*. In fact, the opinion of the Fifth Circuit Court of Appeals is based almost entirely on the *Lee* case, supra.

But the important and controlling difference between the *Lee* case and both the *Valesi* case, upon which we rely, and the case at bar, is this. In the *Lee* case the insured had been treated on several occasions for Bright's disease, and his answers in his application did not disclose those treatments or the names of the doctors who gave them; and the insured died of that very condition, namely, Bright's disease. The *Lee* case would be square authority for respondent and against petitioner, and would support the decision of the Fifth Circuit Court of Appeals in the instant case, if, and only if, Jacob M. Dampf had died of diabetes instead of from coronary thrombosis, admittedly an entirely unrelated cause.

But Mr. Dampf did not die of diabetes. He died of the very thing which he had freely and unhesitatingly stated, in his application, had claimed both his father and mother—heart trouble. And the *Valesi* case, supra, decided some three years after the *Lee* case, and never since overruled or otherwise abrogated in any way, states the law of Louisiana to be that absent any causal connection between matters which

would have been revealed had there been no failure to disclose or misrepresentation, and the death of the insured, actual fraud on the part of the insured must be alleged and proved if recovery on the life insurance policy is to be denied.

The Fifth Circuit Court of Appeals states that the argument that the misrepresentation was immaterial because "the insured died from coronary thrombosis and not from diabetes, we think begs the question." But in determining whether or not actual fraud must be alleged and proved, the Louisiana Supreme Court in the *Valesi* case has unmistakably said that the very first question to be determined is whether or not the alleged matters allegedly concealed had causal connection with the death. In the face of the *Valesi* case, clearly, the inquiry in a case of this character must concern itself with the cause of death and the relationship of that cause to the facts allegedly concealed; and to suggest that such an inquiry "begs the question" is, we submit, to ignore completely one of the two vital questions in the case which the Louisiana Supreme Court has unequivocally stated must be answered.

That respondent's able Louisiana counsel full well realized the necessity of alleging and proving fraud on the part of Mr. Dampf in this case is, as above suggested, illustrated by the fact that not only does respondent's answer allege that Mr. Dampf's answers in his application were false and fraudulent and known by him to have been false and fraudulent, but also that the answers were made by him "for the purpose of deceiving defendant as to the true condition of his health in order to secure the issuance of said policy" (R. 8), and in its motion for a directed verdict respondent squarely asked that the policy be declared null and void "by reason of fraud on the part of Jacob M. Dampf" (R. 119).

Since in the absence of causal connection between the condition allegedly concealed and the death, a determination of whether or not Mr. Dampf was guilty of fraud with intent to deceive was essential under Louisiana law, and since the Fifth Circuit Court of Appeals admittedly would not and did not consider that question, that alone, we believe, requires that Your Honors grant certiorari herein and thereafter grant or order such relief as you believe appropriate.

QUESTION 3.

If verdict should not have been directed in petitioner's favor, was petitioner entitled to have his case submitted to a jury?

We again mention that this was a business policy, one of two reciprocal policies taken out in favor of each other by business partners with no right reserved to change the beneficiary. Petitioner offered to prove (R. 115) that he paid the premium on the policy of Mr. Dampf, and that Mr. Dampf paid the premium on the policy on the life of the petitioner. The good faith of petitioner himself has not been questioned by anyone. Presumably the details of this business arrangement were fully known to respondent and its agents.

Only Mr. Dampf was charged by respondent with fraud with intent to deceive, and it is the law of Louisiana, as elsewhere, that fraud is never presumed, and the burden rests upon the person alleging fraud to prove it. See *Mutual Life Insurance Company of New York vs. Rachal*, supra.

There was no evidence whatever to the effect that Mr. Dampf had ever been told, or believed, or had reason to believe, that he was seriously ill or that he thought or should

have thought that the matter about which he consulted Dr. Hirsch would have any tendency to shorten his life. The sugar in his urine quickly disappeared, and he was convinced, as the record abundantly shows, that he was perfectly well long before he applied for this insurance policy (R. 92, 93, 111, 113). Petitioner's attempts to produce additional testimony to the effect that ". . . during the period of time from approximately in March, 1947, until the time of the death of Mr. Dampf, in September, 1947, that the actions, conduct, and words of Mr. Dampf, and the manner in which he lived and acted, indicated that Mr. Dampf did not believe he was ill during that period, but, on the contrary, was in good health; and that the matter about which he had consulted Dr. Hirsch in February and March, of 1947, was a mere passing ailment and temporary, which no one looked upon as serious," were prevented by objections which were sustained by the Trial Court (R. 93, 94, 95, 103, 104, 106, 108).

Although the Trial Judge refused to admit the above-mentioned testimony, he did permit proof of Mr. Dampf's good character. We did not then quite understand and do not now quite understand why proof of good character was admissible if the other evidence was not; we felt then and feel now that all the evidence was admissible. In any event, Mr. Dampf's good character and reputation were fully shown.

So we have a case of a man of mature years who did not believe he was ill at all, and who was thoroughly convinced that such slight indisposition as he did have completely cleared up within a few days, a man of very high character and reputation, and a man who applied for an insurance policy, under which he, himself, was not obliged to pay the premium as it

was to be paid and was paid by the beneficiary and owner, his business partner.

There was no reason in the world for Mr. Dampf to misrepresent anything he thought might have been material. If Mr. Dampf had answered the questions in the application as respondent now, after he is long since dead, says he should have answered them, and even if respondent despite its own medical examinations conducted independently and its tests of Mr. Dampf's urine in its home office, which admittedly were done and made, had decided not to issue this policy, it is a fact of which we believe Your Honors can take judicial notice that a policy could have been obtained from some other company, though possibly at a premium rate higher than the rate for that particular age. Indeed, petitioner offered to prove that; objection to that testimony was sustained by the Trial Court (R. 76, 77).

It would not have cost Mr. Dampf one penny for his policy to have been issued by some other company than respondent even if the rate had been higher; petitioner was the one paying the premium on Mr. Dampf's policy and not Mr. Dampf. These two men wanted protection for their business; and it would be ridiculous to believe that Mr. Dampf would have done anything to jeopardize those business policies particularly when any increase in the premium on Mr. Dampf's policy would be borne not by Mr. Dampf, but by Mr. Rhodes.

No expert medical witness has ever yet testified that Mr. Dampf had diabetes or was thought to have diabetes. Dr. Hirsch repeatedly and consistently refused to testify as an expert. And the testimony of Dr. Hirsch on which respondent

relies conflicts with his own written statement. In defendant's exhibit D-12 (R. 173) in answer to the question reading:

> "Give the date, cause, duration, and result of each illness for which you treated the deceased within five years prior to death,"

Dr. Hirsch gave as one of the dates 28 February 1947; gave as the cau diabetes mellitus, with a question mark after that cause; and gave the duration as "not long (see above)." On the line above under "result" is stated "well (no findings)." Further under the heading "result" Dr. Hirsch stated "sugar free since Mch. 25- 1947."

The question mark which Dr. Hirsch placed after the words "diabetes mellitus" indicates quite plainly his own doubt as to his diagnosis. And that Mr. Dampf was well, with no findings, and sugar free after March 25, 1947, which was approximately three months before the policy in question was issued, is shown by respondent's own exhibit.

The best that could be said for respondent's case is that issues of fact were thus presented by respondent's own evidence not only as to whether or not Mr. Dampf ever did have any diabetes at all, but also as to whether or not he had any reason whatever to think he was ill after March 25, 1947. And the way Mr. Dampf acted and lived and spoke thereafter, his actions, words, and conduct, were matters properly to be considered by a jury along with the other evidence, in determining whether or not these issues of fact were to be resolved in favor of petitioner or respondent.

From Couch, Cyclopedia of Insurance Law (1931) Vol. 3, Section 782, we quote the following:

> "*Duty to disclose as affected by belief as to materiality of facts.* . . . It has been held, even in England, that if

there is no designed and intentional withholding, and no fraud, the failure to disclose, resting entirely upon the honest belief that the fact is not material, will not avoid the contract. And there are American decisions in line with this decision, it being held that, if the facts not disclosed are not material in the mind of the insured, the policy is not thereby vitiated, there being no intended or designed withholding or fraud. Again, if such rulings be held not to express a sound view of the law, then where must the line of demarcation be drawn? All disorders of the system may have a tendency in some degree to shorten life. Must the insured give a careful and exact history of all his disorders, temporary illnesses, and the like, without regard to their permanent effect upon his physical health? If so, then it is doubtful if recovery could be had upon any life policy, for all lives would be rendered uninsurable.

* * *

"Summarizing the decisions, they seem to agree that the terms 'sickness' and 'disease' do not mean a trifling illness or occasional physical disturbances resulting from accidental causes, and not permanent in their effects, or a temporary illness which readily yields to professional treatment and leaves no permanent physical injury or disorder, calculated, or having a tendency, to shorten life . . .

* * *

"But if the insured at the time of effecting the policy is in such a condition of health and strength as would warrant a reasonable and honest belief that his health is good, and that he is free from disorders, and disease or symptoms of disease, which would tend to shorten life, and this fact is not one which he ought reasonably to know, and he is not guilty of any negligence in failing to learn his physical condition, then his policy ought

not to be vitiated, though he fails to disclose that he has had some disorder, sickness, or symptom of disease, even though it might actually be material. The question should be left to the jury whether the insured truly represented the state of his health so as not to mislead or deceive the insurer . . ."

The Louisiana authorities demonstrate unquestionably that such issues are fact issues and are for the trier or triers of the fact. In every case the Louisiana Courts, sitting as triers of the fact, have considered all of the evidence and particularly evidence as to the actions, words and conduct of the insured, in determining whether or not an answer or answers though technically and actually false or untruthful, should be allowed to void the policy.

For instance, in the case of *Cunningham vs. Pennsylvania Mutual Life Insurance Company*, supra, plaintiff sued upon a policy of insurance on the life of her deceased husband who was himself a physician. The policy was issued in January, 1916; the insured died in November, 1916. The application asked when the insured was last attended by a physician or consulted one, for what disease the insured consulted or was attended by a physician, and that the name and residence of the physician and full details be given. The answers were that he had last seen a physician about ten years before, for malaria, and the name was given as Dr. R. E. Webb of Rayne, Louisiana, and it was stated that complete recovery followed an illness of two or three days. The evidence was undisputed that on May 30, 1914 in New Orleans the deceased visited a firm of specialists in genito-urinary diseases, was examined and treated there, and returned at intervals three or four times until June 26, 1914; and that these specialists diagnosed his trouble as slight non-gonorrheal prostatitis and vesiculitis. The

head medical director of defendant said he would not have approved the application had he known those facts.

In affirming judgment for plaintiff, the Louisiana Supreme Court said:

> "It is entirely possible for answers to such questions to be knowingly untrue from a literal standpoint, and yet not fraudulent, for the applicant may, in good faith, have considered the facts not of sufficient importance to report, especially in view of the law, as announced by the decisions of this court and sustained by the jurisprudence of the other states, to the point that inconsequential illnesses do not have to be disclosed, even though they may have occasioned the attendance of a physician. *Goff et al. v. Mutual Life Ins. Co.*, 131 La. 98, 59 South. 28, *Cole v. Mutual Life Ins. Co.*, 129 La. 704, 56 South. 645, Ann. Cas. 1913B, 748, and authorities cited in those cases. Nothing is charged to show that, if the information was material, deceased knew of it, or that his action was not due to honestly mistaken judgment."

And the Supreme Court of Louisiana, as a trier of the facts, even stated positively that despite the fact that the head medical director testified that he would not have approved the application had he known the true facts, it was not obliged to accept that testimony but could determine for itself, on all the evidence, whether or not the insurer would have declined the application. In other words, the Louisiana Supreme Court squarely announced the rule of law to be that as a trier of the facts, it had a right to determine from all the evidence whether or not the policy would have been rejected, even though there was uncontradicted testimony from the head medical director of the defendant company that the policy would have been rejected.

In the case of *Blackwell v. Fireside Mutual Life Insurance Company* (1st Cir. App. La. 12/29/42) 11 So. 2nd 65, the insured had one of her breasts removed on June 21, 1938; she returned home on July 6, 1938, and applied for insurance the following day. Cancer caused her death on October 16, 1939. In the application she signed, when asked whether or not she had ever undergone a surgical operation she stated "operated on for female trouble in 1932," She denied having consulted a physician within the past two years. The policy was issued July 11, 1938, and after her death payment was refused on the ground of fraud and misrepresentation; suit followed and the beneficiary recovered. Although it is true that the policy in that case was issued without a medical examination and one of the grounds of the decision was that because of that fact the company was estopped from setting up alleged misrepresentations as a defense to avoid payment, nevertheless in speaking of the answers given by the insured in her application and the legal effects to be given to those answers in Louisiana, the Court said this:

> "Obviously, the above answers were untrue. Whether or not they were wilfully given with the intent to deceive and defraud depends very much on the importance that the applicant attached to them and her purpose in not giving all the facts, as well as her knowledge of the serious nature of her complaint and whether or not she actually believed that the operation she had undergone had corrected her trouble. Answers in an application for life insurance may be knowingly untrue and yet not fraudulent. *Cunningham v. Penn Mutual Ins. Co.*, 152 La. 1023, 95 So. 110."

Any doubt whatever as to whether or not these are fact issues or law issues is completely dispelled by the decision of

the Louisiana Supreme Court in the case of *Cole v. Mutual Life Insurance Company of New York*, supra, which specifically states that questions such as the one involved here are questions of fact. In that case the Court said this:

> "On the merits, the contention of the defendant is that the statements made by the assured in his application for reinstatement, to the effect that, 'except as noted below, his health has been good and has remained unimpaired since the last examination for policy No. 1,384,385,' and that 'he has not consulted a physician since that time,' were false, and have had the effect of avoiding the policy.
>
> "This raises a question of fact, for the determination of which an examination for the facts is necessary.
>
> * * *
>
> "From the foregoing evidence it is perfectly clear that the assured was sincere in saying that he was in good health.
>
> * * *
>
> "That the assured, when making his application for reinstatement, did not look upon these consultations (if, indeed, they had then already taken place) as having been such within the intendment of the policy, appears from his not having mentioned them in his statement. He would have been without motive for making a secret of them, for there can be no doubt that he did not consider this soreness of his throat as having been or being anything serious.
>
> * * *
>
> "The evidence leaves no doubt that he, his mother, and his wife, and even Dr. McLemore, considered his sore throat nothing more than a common, temporary inflammation of the throat—a mere trivial, passing ailment, not impairing the general health."

On the question of Mr. Dampf's good faith and state of mind, and his belief as to whether or not he was ill, we believe the following is of extreme significance. He stated in the application that his father died of arterio-sclerosis and that his mother died of a heart attack. He himself died of coronary thrombosis. In laymen's language, Mr. Dampf himself died of a heart attack (R. 63). It stands to reason that because of the death of his father and mother from that very cause, Mr. Dampf had cause to believe that heart trouble would eventually claim him, as in fact it did. And yet the fact that it had claimed both of his parents was openly stated by him. If he had really felt that anything should have been concealed, it stands to reason that the cause of death of his parents would have been the things that he would have concealed.

We believe the above clearly demonstrates that under Louisiana law fact issues are involved which should have been submitted to a jury, the trier of the facts.

QUESTION 4.

We mention, only briefly, errors in the admission of and rejection of evidence.

a. Cross-examination of a witness was permitted, over objection, touching matters not inquired into on direct examination (R. 16-17). A recent case, *Zumwalt v. Gardner* (8th C.C.A., 4/4/47) 160 F. 2nd 298, at page 303, declares this to be error. It is of no particular importance, but if this case is remanded for re-trial a similar error might be prejudicial.

b. A certificate of death was admitted in evidence, over objection, for purposes beyond that of showing the cause of death (R. 19-87). This also, is mentioned, primarily to protect the point in the event of re-trial.

c. A widely circulated advertisement of respondent respecting diabetes, which materially conflicted with testimony given by respondent's chief medical witness on the witness stand, was not admitted in evidence (R. 76). This advertisement, and a similar one, to which reference has previously been made, are appended to this brief as Appendix-A and Appendix-B. This error was clearly prejudicial if, as we contend, fact issues are involved.

d. Testimony that other companies would have insured Mr. Dampf, even if he were a known diabetic, was not admitted (R. 77). This was clearly relevant and admissible on the question of Mr. Dampf's good faith, since he was not obliged to pay the premium on the policy on his life; and the error was prejudicial.

e. Testimony of numerous witnesses as to what the insured's actions, conduct, and words indicated, respecting his physical condition, prior to and at the time the insurance policy in question was applied for and issued, was excluded (R. 93, 94, 95, 96, 99, 100, 103, 104, 106, 108). This testimony was clearly admissible as touching on Mr. Dampf's good faith, on whether or not he was guilty of fraud, and on whether or not he believed or had reason to believe that he had any serious illness or disease. We consider this error highly prejudicial.

f. Testimony that petitioner, the insured's business partner, paid the premium on the policy sued on, offered to show that Mr. Dampf had no reason to misrepresent facts in order to get a cheaper premium rate, was excluded (R. 115-116). This testimony was admissible to show that Mr. Dampf had no pecuniary reason whatever to attempt to defraud or deceive this respondent; even if this respondent had refused to

issue the policy, he could and would have obtained one elsewhere and if it did cost more money, Mr. Rhodes and not Mr. Dampf would have been the one to pay it. Again prejudice is claimed by petitioner because of this error.

We mention these errors in admission and rejection of evidence primarily so that, if Your Honors grant certiorari as we believe you will, you may, if you care to do so, consider these errors as well as the principal features of this case.

CONCLUSION

Admittedly there was no causal connection whatever between the matters about which Mr. Dampf consulted Dr. Hirsch on four occasions between February 28, 1947, and March 25, 1947, and Mr. Dampf's death during the night of September 10-11, 1947. That being true, under Louisiana law Mr. Dampf's failure to disclose his consultations with Dr. Hirsch when he applied for the policy sued on, does not vitiate the policy unless Mr. Dampf's actions constituted actual fraud. This was recognized by respondent in its answer to the complaint, and its motion for a directed verdict; but the Fifth Circuit Court of Appeal did not apply the law of Louisiana as expressed in the case of *Valesi vs. Mutual Life Insurance Company*, supra, and instead decided this case as if a determination of whether or not Mr. Dampf was guilty of fraud with intent to deceive was unnecessary. This alone, we believe, justifies and requires that certiorari be granted.

Since fraud was not proved by a preponderance of the evidence, petitioner was entitled to a directed verdict in his favor. But if it can be said that the evidence touching fraud conflicted (the best possible view from respondent's stand-

point), Louisiana Courts sitting as triers of the facts have uniformly treated questions such as are presented in this case as questions of fact. In at least one case, *Cole v. Mutual Life Insurance Company of New York*, supra, the Louisiana Supreme Court has specifically stated that questions such as the ones involved here are questions of fact.

Therefore, in a Federal Court sitting in Louisiana in a diversity case, such as this, where a jury trial was properly demanded, it is error for a Judge or Judges on conflicting evidence to take the case from a jury; and this is particularly true where, as here, widely published advertisements of respondent itself materially conflicted with the testimony of respondent's chief medical witness to the effect that respondent would have rejected this policy if it had known all of the facts which it now contends it should have known. The advertisement should have been admitted in evidence, and should have been submitted to the jury along with all the other evidence so that the jury might have weighed all reasonable inferences to be drawn therefrom against the rather vague testimony of respondent's chief medical witness.

Errors occurred in the admission and rejection of evidence which this Court may desire to comment upon, or correct, if the Court grants certiorari, as we believe it will.

Petitioner humbly requests this Court to exercise its discretionary power to the end that justice may be served in this case and that either judgment be rendered in favor of petitioner, or the case be remanded with instructions for submission of the whole case to a jury under appropriate instructions as to Louisiana law and with proper rulings on admissibility of evidence.

All of which is most respectfully submitted.

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By: _____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 776

LYMAN P. RHODES, JR., PETITIONER

VS.

METROPOLITAN LIFE INSURANCE COMPANY, RESPONDENT.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The petition here is for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review its decision which has affirmed the action of the trial court in directing a verdict for respondent, the defending insurance company.* Petitioner, Lyman P. Rhodes, had sought to recover the sum of $20,000.00 being the face amount of a life insurance policy issued by Metropolitan Life Insurance Company, respondent, upon the life of Jacob M. Dampf, now deceased. Rhodes, the named beneficiary, and Dampf had been business partners.

*Rhodes v. Metropolitan Life Ins. Co., 172 F. (2d) 183 (U.S.C.C.A., 5th, 1949).

The defense, upheld by the trial court and the Circuit Court of Appeals, was that, in order to obtain the insurance, Dampf had fraudulently misrepresented that he was in good health at the time of his application for the policy and, by false statements in his application, had concealed from respondent insurer the fact that shortly prior thereto he had been examined by his physician, Dr. E. K. Hirsch, who advised him that he was suffering from diabetes and treated him for this ailment for some time.

Dampf applied for the policy on June 19, 1947, and paid the semi-annual premium of $307.00 in advance. Upon subsequent acceptance of the application by Metropolitan, the policy was made effective as of the date of the application.

Dampf died of coronary thrombosis (at the age of 52) on September 11, 1947, less than three months after the effective date of the policy, and well within the two-year contestable period.

Investigation into the health history of Dampf revealed a history of diabetes and treatment therefor by Dr. Hirsch, who made a diagnosis of diabetes as a result of blood sugar tests and urinalysis. Dampf went to Dr. Hirsch for examination and treatment in 1945, and again on February 28th, March 5th, March 19th and March 25, 1947, this last date of consultation being less than three months prior to Dampf's application for the life insurance policy. Dr. Hirsch specifically told Dampf that he was an incurable diabetic. (See quotations from Transcript, below).

A photostatic copy of Parts A and B of Dampf's application for the insurance policy was attached to and made a part of the policy when issued. The policy and application were filed

herein (D-13). Attention is drawn to the following questions and answers appearing in part B of the application:

QUESTION NO. 8: "Have you ever been told that you had albumin or sugar in your urine? If yes, state when, for how long and describe treatment received.

ANSWER: **"No.**

QUESTION NO. 11: ". . .(c) Have you ever had any ailment or disease of the Stomach or Intestines, Liver, Kidneys or Genito-Urinary Organs?

ANSWER: **"No.**

QUESTION NO. 12: ". . .(c) Have you ever had Diabetes, Pleurisy or Pneumonia?

ANSWER: **"No.**

QUESTION NO. 12: ". . .(g) Have you consulted a physician for any ailment or disease not included in your above answers?

ANSWER: **"No.**

QUESTION NO. 13: "What clinics, hospitals, physicians, healers or other practitioners, if any, not named above, have you consulted or been treated by, within the past five years? If none, so state.

ANSWER: **"None."**

Respondent submits that it was fully proved on trial that the answers to each of the foregoing questions were not true, but were utterly false and inaccurate, that Dampf knew them to be false and inaccurate at the time, and that he deliberately and purposely gave the said false answers as material inducements to the respondent to issue to him the policy of life insurance.

A REVIEW OF THE EVIDENCE

Lyman P. Rhodes, Jr.:

The petitioner, Lyman P. Rhodes, Jr., testified first, and upon cross-examination, admitted that Mrs. Dampf had told him that her husband "had consulted Dr. Hirsch and that Dr. Hirsch had diagnosed [Mr. Dampf's condition] . . . as diabetes." (Tr. 18). After the petitioner had testified and offered the policy, he rested his case.

Dr. E. K. Hirsch:

The first witness for the defense was Dr. Hirsch, who had diagnosed Dampf's ailment as diabetes and had treated him for it. Dr. Hirsch testified that he first saw Jacob Dampf professionally on July 9, 1945, when he complained of frequency and burning on urination (Tr. 31). He next saw him on February 28, 1947, when he complained of boils (Tr. 31). Examination on that date revealed "sugar in his urine" (Tr. 32). Dr. Hirsch told Jacob Dampf that he had sugar in his urine and requested him to save his urine and submit it to Dr. Hirsch for twenty-four hour examination. (Tr. 32)

"Q. Did you tell him he had sugar in his urine?

"A. Yes, sir; told him why we should examine the twenty-four hour specimen." (Tr. 32-33)

Then the doctor sent Dampf to the hospital to have a blood sugar test made. That test showed sugar to such an extent that continued "examination and observation" was deemed necessary ". . . to determine definitely whether it was a diabetic condition." (Tr. 33)

Dr. Hirsch then stated:

"From then on, we gave him a certain definite diet; gave

him a little apparatus with which our patients test their own urine." (Tr. 33)

He testified further that Dampf sent specimens of his urine to him on February 28th, March 1st, March 2nd, March 3rd and March 4th and that, on March 5, 1947, (Tr. 34) he saw Dampf again. He said:

"At that time we made a diagnosis of diabetes.

"Q. **Did you so inform Mr. Dampf?**

"A. **I did.**

"Q. And then you saw him again?

"The Court: What date was that?

"The Witness: The fifth of March.

"By Mr. Porter:

"Q. **That was when you told him definitely, he had diabetes?**

"A. **That's right. We outlined a diet for him, and asked him to keep an absolute record of every mouthful he ate, and his sugar tests he made at home, and to bring them back into the office.**

"Q. Did he make such tests, and keep such records?

"A. He did.

"Q. Do you have them there?

"A. I have them." (Tr. 34-35)

The records were introduced as Exhibits D-2 through D-9.

Dr. Hirsch testified that he again saw Mr. Dampf on March 19th and March 28, 1947. (Tr. 37). Thereafter, although the doctor did not change his diagnosis of diabetes and specifically told Dampf to return to the office "shortly," he never came

back to see him professionally. Dr. Hirsch had an explanation for this:

"Q. Have you any idea why he didn't come back?

"A. Yes, I have.

"Q. Why?

"A. Well I used to see quite a bit of Mr. Dampf, **and Mr. Dampf told me he wasn't going to fool with me any more; when it came time to die he was going to die.**

"Q. Did you, or not, ever tell Mr. Dampf, categorically, that he had diabetes and that he'd never get over it?

"A. Yes, **I told him he had diabetes and would never get well from it.**" (Tr. 38)

Dr. Hirsch then identified the "Proof of Death" signed by him with reference to Dampf's death (D-12) whereon he had answered the following question thus:

"6. Was the deceased afflicted with any infirmity, deformity, or chronic condition? If so, specify which, and give duration. [Answer] Yes—Diabetes Mellitus."

Dr. Hirsch was asked whether he considered diabetes an incurable disease and why he told Mr. Dampf he would not ever get over his diabetes. He answered:

"My experience with diabetes is that it is incurable." (Tr. 44)

Upon cross-examination, petitioner's counsel examined the witness as follows:

"Q. . . . Now you testified, Doctor . . .something Mr. Dampf told you, about when he was going to die he was going to die, or something to that general effect.

"A. (Nods affirmatively).

"Q. Was that while you were treating him professionally? that is, before the 28th of March, which, I think, was the last date you saw him; or was it after that?

"A. After that.

"Q. You saw him in a social or business way, did you?

"A. Social.

"Q. Can you remember, with substantial correctness, just about what he said.

"A. Well, that's pretty close to it. We had been speaking—we were playing cards one afternoon, and I had to go to the hospital to be with a lady, with an illness, and when I came back—we were all friends—somebody asked how she was; I said I didn't think she would live twenty-four hours longer. **And the conversation went on in that relative strain, about people dying when their time came, and he remarked—we were speaking about him, and I told him he hadn't been back to my office for some weeks or months. He says, 'I'm not coming back. When my time comes I'm going to die anyhow'**; some such remark with that meaning. The exact words I could not possibly remember." (Tr. 45-46)

Since the last time Dampf saw Dr. Hirsch professionally was on March 28, 1947, it is plain that the foregoing discussion at the card table was **"some weeks or months" after March 28th.** Jacob Dampf applied for the insurance policy at issue here on June 19, 1947, which was less than three months after March 28, 1947. Thus, it is unequivocally clear, that **within a very few weeks from the date of his application for the insurance policy, Jacob Dampf was discussing fatalistically with Dr. Hirsch the fact that he, Dampf, was suffering from the diabetes which Dr. Hirsch had diagnosed.**

Petitioner's counsel asked this question:

> ". . . Do you recall about how long prior to his death it was you had last seen him, in a social way?
>
> "A. No. I don't recall exactly. It could (sic) have been many days. I saw Jake quite frequently. I know I was out of town about the time of his death, and for a day or two prior to that time. Not many days, I am sure." (Tr. 48)

It is obvious from the context that the word "not" is erroneously omitted from the sentence marked "sic."

Then petitioner's counsel asked Dr. Hirsch whether, after March 25th, Dampf "carefully" followed his diet. Dr. Hirsch replied:

> "The word 'carefully' makes it hard to answer. He was continuing to diet in some manner; that is certain. We had many meals together, many refreshments in the evening together, and he would refrain from eating any highly sweet foods at that time, without any comment from me. The only comment I ever made to Jake about coming back to be checked was the time I spoke of when he said he was not coming back." (Tr. 48-49)

So it appears that Dr. Hirsch saw Dampf frequently until a few days prior to his death, in September, 1947; that, for a considerable period after March 25th, Dampf was following his diet "in some manner; that is certain;" that, with sure fatalism, on June 19, 1947, Dampf knew he was going to die; that he was fully aware of his incurable diabetic condition at the time that he gave the five knowingly false answers to his application for the insurance policy, on June 19, 1947.

* * *

Dr. Albert O. Jimenis:

Dr. Jimenis, Associate Medical Director of the respondent, testified that he was in charge of the medical underwriting of ordinary life insurance; that it was his job to examine applications for insurance and pass upon them. He said:

> ". . . We examine those papers and decide whether we want more information, whether we can issue the policy, or whether we should rate the policy, or whether we should reject the application for life insurance." (Tr. 52)

In such capacity it was Dr. Jimenis who reviewed and passed upon Jacob Dampf's application for the insurance policy here at issue.

Dr. Jimenis was shown the five negative answers which respondent has proved were falsely given, and he was asked:

> ". . . Now, Doctor, what is the policy of your company, and what would you have done, as Associate Medical Director of your Company, had those answers, or any one or more of them, been answered in the affirmative?
>
> "A. **We would not have issued this policy.**
>
> "Q. What is the policy of your company in issuing policies of insurance to those suffering with diabetes?
>
> "A. **We do not insure anyone who suffers with diabetes."** (Tr. 55)

* * *

> "Q. **I take it, these answers, having been answered negatively, was the reason why you approved his policy for issuance?**
>
> "A. **Yes sir. . .**" (Tr. 55-56)

* * *

"Q. Why does your company not insure diabetics?

"A. We consider diabetics as non-insurable because they die at approximately two and one-half times the rate of the general population, and we cannot insure them at general premiums.

"Q. Do you insure them at all? your company.

"A. **We don't consider that they are insurable at any premium.**

"Q. **You do not insure them?**

"A. **We do not.** (Tr. 58)

Dr. Jimenis was then asked what his reaction would have been if some of the questions had been answered affirmatively and some negatively. He was examined separately as to each question. In some cases he stated that he might have made further inquiry and investigation before rejecting the application for insurance. But, in every case, his final answer was the same, namely that, if there were a finding of diabetes, the application would have been rejected. (Tr. 53-59). For example, Dr. Jimenis was asked what he would have done if Dampf, in answer to question No. 13, had named Dr. Hirsch as a physician who had treated him in the past five years.

"A. We would have asked him, 'For what disease did Dr. Hirsch treat you?'

"Q. And if you had found out that the treatment had been for diabetes, what would you have done?

"A. **We would have rejected the application."** (Tr. 59)

In explanation of the fact that examination of Dampf's urine did not show sugar at the time of his application, Dr. Jimenis had this to say:

"Q. Doctor, is it possible for a person to have diabetes and for the sugar not to show up in his urine, from time to time?

"A. Yes, it is, particularly if he is under the proper treatment." (Tr. 78)

Petitioner's counsel asked Dr. Jimenis:

"Q. . . . What is the proper treatment for a known diabetic?

"A. Well, the proper treatment would be, first of all, diet, not only as to the quality of diet but also quantity of diet, the elimination of any overweight, and if necessary, and when necessary, the use of insulin." (Tr. 80)

Thus we see that Dampf, knowing he was a diabetic, undertook treatment and diet to render his urine free from sugar. Then he made application for the insurance policy here sued on. He, falsely and fraudulently, gave untrue answers to the five questions which should properly have elicited from him information as to his diabetic condition.

It is also clear that, but for the said false and fraudulent answers in the application, the insurance company would not have issued the policy here sued on.

* * *

Dr. B. E. Nelken:

Dr. Nelken signed Jacob Dampf's death certificate (Tr. 82), reciting in the blanks thereon, among other things:

"30. Immediate cause of death.

"Coronary Thrombosis with myocardial infarction.

"31. Due to.

————————(blank)————————

"32. Other conditions (Include pregnancy within three months of death).

"Diabetes Melitus (From history)." [Emphasis supplied]

A certified copy of the death certificate is filed as Exhibit D-1.

In his explanation of his writing "Diabetes Melitus (from history)," Dr. Nelken testified without objection, viz.,

"Q. Upon what basis did you write that answer?

"A. I wrote it from statements made by, I think, as I recollect, by Mr. Dampf; possibly it was Mrs. Dampf, but as I recall it, it was by Mr. Dampf." (Tr. 86)

Dr. Nelken said that Mr. Dampf told him about his diabetes when they met on a social occasion at Mr. Dampf's home, a while before he died. (Tr. 89)

* * *

Mrs. Jacob M. Dampf:

Called as a witness by the petitioner, Jacob Dampf's widow testified that, after he stopped going to see Dr. Hirsch, he continued to make tests of his urine at home, and that he followed his diet "after a fashion." (Tr. 111)

* * *

Other Witnesses:

We have reviewed above all of the testimony of any substance. Other witnesses were offered by the petitioner, in re-

buttal, and they testified in substance that the late Mr. Dampf was a business man having a good reputation.

* * *

In view of the foregoing, it is submitted that, upon all of the evidence, it is unequivocally clear that **first,** Jacob Dampf, in his application for the policy sued on, gave five separate answers, each of which was false; **second,** each of the answers was known by Dampf, at the time he made the answers, to be false; **third,** that the said answers were made by Dampf for the purpose of deceiving respondent as to the true condition of his health, in order to secure the issuance of the policy and, accordingly, the answers were not only false but fraudulent; **fourth,** the false and fraudulent answers dealt with matters material to the risk of the said policy; and **finally,** the policy would not have been issued had the true facts been disclosed by Dampf in his application for the policy, the false answers being material inducements to the issuance thereof.

Hence the insurance policy was null and void at its inception by reason of fraud on the part of Jacob M. Dampf.

APPLICABLE JURISPRUDENCE

In seeking a writ of certiorari, petitioner contends that the decisions heretofore rendered herein in favor of respondent are contrary to the established jurisprudence of Louisiana.

The first answer to this is that Your Honors have already denied certiorari in a Louisiana case raising practically identical issues.

In *Jefferson Standard Life Ins. Co. v. Stevenson,* 70 F. (2d) 72, (CCA, 5th, 1934, certiorari denied, 293 U. S. 585, 79 L. Ed. 681, 55 S. Ct. 100), the court considered a case fundamen-

tally identical to that now at bar, and held that it was error for the District Court to have refused to direct a verdict for the insurance company.

In that case,

"The Jefferson Standard Life Insurance Company issued a policy of insurance for $4,000, effective August 23, 1930, in compliance with a written application of that date, on the life of Alberta B. Stevenson. The insured died in May, 1931, within the contestable period, of tuberculosis. Her husband, the beneficiary named in the policy, brought suit upon it. The application for insurance, which was signed by the insured and attached to and made a part of the policy, contains statements in the form of questions and answers to the effect that the applicant had never suffered from any ailment or disease of the lungs; had not consulted a doctor for any other cause; had not been disabled or received medical attention within the past five years; that Dr. W. A. Rogers was her family physician; and that she was the mother of five children, the youngest being twelve months old. The application also contained the following: 'Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk and that the Company believing them to be true will rely and act upon them.' The insurance company defended on the grounds, among others, that those statements and representations of the insured were relied on by it as being true; but that they were untrue, in that at the date of the application the applicant was, and for some time before had been, suffering from tuberculosis or lung trouble, and within five years had received from Dr. Rogers medical attention because of the condition of her lungs. There was a verdict and judgment for the plaintiff. **The insurance company appeals, and assigns as**

error the denial of its motion made at the close of the evidence to direct a verdict in its favor. That motion did not set forth the grounds upon which it was based, but was in general terms.

"In July preceding the application for and issuance of the policy of insurance in August, the insured made five visits to Dr. Rogers' office, where on the occasion of each visit she was given by him an injection of sero bacterin." (70 F. 2d at pp. 72-73)

The Court of Appeals, citing *Lee v. New York Life Ins. Co.*, 144 La. 445, 80 So. 652, (1919), then said:

"**In our opinion it was error to refuse to give the peremptory instruction.** It is undisputed that within a month before making application for insurance the applicant was in the care of and receiving medical attention from her family physician. **Whatever her own opinion as to whether she was suffering from a disease of the lungs might have been, her representation that she had not received medical attention within five years was untrue. A false representation, though made in good faith, as to a matter that is material is generally held sufficient to avoid a policy of life insurance.** *New York Life Ins. Co. v. Price,* (C.C.A.) 16 F. (2d) 660; *New York Life Ins. Co. v. McCarthy* (C.C.A.), 22 F. (2d) 241. **And this general rule prevails in Louisiana,** where this contract of insurance was made. *Lee v. N. Y. Life Ins. Co.*, 144 La. 445, 80 So. 652. The false representation was also material if the physician and his assistant told the truth. They both said the insured was told by the physician that her lungs were seriously affected. The plaintiff not being present at the interview did not and in the nature of things could not contradict that testimony. He sought to impeach the physician, but the testimony of the witness who corroborated him remains uncontradicted and unimpeached. According to the plaintiff's version, his wife was suffering from a cold to such

an extent that he himself thought it was advisable to take her to a physician for medical attention. **Under all the evidence, therefore, we think the false representation was material.** *Aetna Life Ins. Co. v. Bolding* (C.C.A.) 57 F. (2d) 626." (70 F. 2d at p. 73)

The United States Circuit Court of Appeals for the Fifth Circuit then reversed the Federal District Court because of its error in failing to direct a verdict for the defendant insurance company. The Supreme Court of the United States denied writs of certiorari (citation, supra, p. 13).

Secondly, respondent submits that the Louisiana decision relied on in the *Jefferson Standard* case, *supra*, namely *Lee v. New York Life Ins. Co.*, 144 La. 445, 80 So. 652 (1919), does squarely uphold the decision of the Circuit Court of Appeals in the present case. In the *Lee* case, the Louisiana Supreme Court **held that where the insured falsely denied (in his application for life insurance) that he had consulted physicians, and that he had heart disease,—and where the court found that, if he had told the truth concerning his consultation with physicians and his heart disease, the policy would not have been issued,—no recovery under the policy could be had even though the death occurred from a cause other than heart disease, which cause was "Bright's Disease."**

In the *Lee* case, the widow of the insured sued upon a $2,500.00 life insurance policy, as the named beneficiary. The defense was that, although the insured had represented himself as being in good health at the time of his application, he was not so in fact and "the insurance was obtained by certain untrue and fraudulent representations and concealments with respect to material facts. . ."

The insured had applied for insurance in January, 1914. He died in August of the same year from Bright's Disease.

In the application for insurance, these questions were asked:

"9. Have you ever suffered from any of the following diseases? . . .

A. Of the brain or nervous system.
B. Of the heart or lungs.
C. Of the Stomach, or intestines, liver, kidneys or bladder
D. . . . .

"10. Have you ever consulted any physician for any ailment or illness not mentioned above?"

The insured had answered "No" to each part of Question No. 9, and added that "With the exception of malaria, as stated below, I do not recall of having ever been sick." In answer to Question No. 10, the applicant said that he had had malaria a year before for about three or four days, and mentioned no other diseases. The Court did not base its decision on the answer in 9(c) because the insured was ignorant of the fact that he had a kidney disease.

The Lee family physician testified that the insured had consulted him in November, 1911, in October and November of 1912, and six times in 1913, that he had examined the insured's urine and told Lee's wife (in 1911 or 1913) that her husband had an incurable kidney disease. The wife had urged the doctor not to tell the husband of this. The doctor did not remember that he had told the insured of his kidney trouble, but testified that he did tell the insured that he had a bad heart and should be careful. (144 La. at p. 449). A Dr. Stafford

testified that he was called to visit the insured one night in May, 1912, and had found him in bed with a bad heart lesion, but did not tell the insured what was the matter, although he prescribed medicine and advised rest. But Dr. Stafford testified that the insured certainly knew that he had been sick.

In upholding the defendant insurer, and denying recovery on the life insurance policy, the Court said:

> **". . . there is nothing which . . . breaks the force of the testimony of . . . (the doctors) . . . to the effect that he (Lee) consulted them during the two years preceding the date of the accident . . . which testimony, we think, is determinative of the case; for if,** instead of answering that he had never suffered from either of the diseases indicated or enumerated in question 9, and had not consulted a physician for any other ailment or illness except malaria, **Lee had stated what had occurred in Dr. Randolph's office within the five preceding weeks, his policy would not have been issued."**
>
> **"It is argued that he did not know that he had Bright's Disease** (but he was told by Randolph whom he was consulting at the time that he had a bad heart) . . ." (at pp. 452-453)
>
> **"It is sufficient, for the purpose of this case,** as it appears to us, **that the applicant for insurance, having, as part of his application and as an inducement to the issuance by defendant of its policy,** stated that he had never suffered from any disease of either of the organs specified in question 9 propounded by defendant, **answered the question 10 propounded to him, by saying that, save in a single instance, he had never consulted a physician for any ailment or illness, other than those mentioned in question 9; that the statement last mentioned is shown, beyond dispute, to have been untrue, to his knowledge; that it**

was material to the question to be considered by the defendant; that the defendant was thereby deceived and induced to do that which it would not otherwise have done, to-wit, issue the policy herein sued on.

"'A false statement as to whether applicant has consulted or been attended or treated by a physician is material to the risk and will defeat a recovery, especially where it is warranted to be true. But, even where the answers are made warranties, substantial truth is all that is required. In analogy with the rule as to the disclosure of temporary or slight ailments, it is held that medical consultation for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction of the language of the application.' 25 Cyc. 816.

". . . the ailments with which the insured . . . was afflicted are shown to have been serious, and the evidence satisfies us that he was apprised of their character, not only by what was told him, but by the treatment that he received, more particularly from Dr. Randolph. We are equally satisfied that, if defendant had been informed that Lee had had his urine tested three times within the five weeks preceding his application, it would not have insured his life without knowing the result of those tests, and that the information that was withheld was therefore material." (at pp. 453-454. Emphasis supplied)

The judgment in favor of the defendant, the insurer, was affirmed.

Summarizing the *Lee* case, where the insured had been told that he was suffering from heart disease, and where he had frequently consulted physicians within the three years prior to his application for insurance, **his failure to reveal the heart disease and his consultation with the physicians defeated**

recovery under the life insurance policy, although the death occurred as the result of Bright's (kidney) disease, of which the insured was ignorant.

So, in the case at bar, the failure of Dampf to reveal the sugar in his urine, his diagnosis of diabetes, his consultations and treatments by Dr. Hirsch, and his daily testings of his own urine to determine its sugar content (within three months prior to his application for insurance) must defeat recovery under the policy, even though the death actually resulted from coronary thrombosis. It is submitted that the doctrine of the *Lee* case fits the case of Mr. Dampf and Mr. Rhodes like a glove.

Vaughn v. Metropolitan Life Ins. Co., 3 La. App. 614 (La. App., 1st, 1925, rehearing refused 1926) was another case in which recovery under a life insurance policy was denied because of misrepresentations of health conditions in an application for life insurance. There the insured had stated that he had never suffered from any ailment or disease of the lungs and that he had not consulted or been treated by any physician within the past five years. It was shown that he had in fact consulted a doctor shortly before making his application, and that the doctor had made a diagnosis of tuberculosis. In upholding the defense that "defendant would not have issued the policy had the answers disclosed the true facts," the court said:

> **"The question is: Were the answers and statements** of James Vaughn in applying for the policy, **so material that the same must be held to have been fraudulent** and defendant thereby deceived into issuing the policy, which it would not have done had full and truthful disclosures been made in response to the question asked." (at page 615)

* * *

". . . we are satisfied from the facts . . . that **he must have been aware and was aware that he had tuberculosis** at the time he applied for the insurance; **therefore his answers amounted to a fraud on the defendant** within the sense and meaning of the law, Act 52 of 1906 . . . and as defined by the Supreme Court in Goff v. Mutual Life Ins. Co., 131 La. 98. . . ." (at p. 616)

So, also, in *Fox v. Life Ins. Co. of Virginia*, 170 So. 55, (La. App., Orleans, 1936) recovery on the policy was denied because the insured had falsely denied a history of blood in his urine. The Court said:

"A statement in an application for insurance to the effect that the applicant is in sound health and has not consulted a doctor within a given period is a representation and not a warranty; the difference between the two being that the falsity of the statement in the one case **does not vitiate the policy unless material and of such a character as may be presumed to have influenced the insurer** whereas, in the other case, the falsity of the statement voids the policy whether material or not.

"'**A representation is material when knowledge of the truth as to the fact misstated might reasonably influence the company in determining whether or not to enter into the contract as made.**' (25 Cyc. 806)" (at p. 57).

The Court then cited and quoted as its authority *Lee v. New York Life Ins. Co., supra*, and, in conclusion, denied recovery, saying:

"We cannot believe that the failure to disclose medical treatment and advice for a more or less persistent case of bloody urination was not willful.

"**In our opinion the failing to disclose this illness and medical treatment therefor constituted a misrepresenta-**

> **tion of a material fact which might have affected the consent of the insurer to the contract of insurance."** (at page 58)

Other Louisiana cases denying recovery because of false statements to the insurer as to the health of the insured are:

> *Mull vs. Sovereign Camp, W.O.W.*, 2 La. App. 401 (Orleans, 1925);
>
> *Carter vs. Life & Casualty Ins. Co. of Tennessee*, 29 So. (2d) 716 (La. App. Orl., 1947); and
>
> *Gongre v. Life and Casualty Co. of Tennessee*, 36 So. (2d) 71 (La. App., 2nd, 1948).

Respondent denies petitioner's proposition that Jacob Dampf was in good faith in making his false statements. He knew positively that he was an incurable diabetic (supra, p. 6) at the time he made his application for insurance.

We refer your Honors to the case of *First Trust Co. of St. Paul v. Kansas City Life Ins. Co.*, 79 F. (2d) 48 (CCA, 8th, 1935), from which the Court of Appeals quoted in its decision in the present case. There the Court said:

> ". . . **The issue here is not one of fact but one of law.** That issue of law is whether the evidence conclusively established the intentional fraud of the insured in the false statements contained in the application [for a life insurance policy]. That these statements were false, were material, and were intentionally false is clearly and indisputably established by this record. **The insured was a man of relatively large business affairs and must have known that the only purpose of the insurer in acquiring information concerning his history, health and habits was to enable it to determine whether it would issue a policy.** It is impossible to think that he could forget these treatments which took him away from his home and to a clinic, and all of which occurred within a few months and one

of which the day before the application, and which were continued, even to a visit made between the signing of his first application and the medical examination—the latter containing one of the false statements. **He could not have regarded a diabetic ailment as so trivial that an insurer would not want to know about it. The only possible rational explanation of his conduct is that he willfully made the false statements for the purposes of concealing the facts and of deceiving the insurer so that he might procure a policy which, if this truth were known, might be refused. In this situation of fact the only question is one of law and that is easy of solution. The law is that where the insured, in his application, intentionally makes a false statement about a material matter, the policy may be avoided.** Mut. Life Ins. Co. vs. Hilton-Green, 241 U.S. 613, 622, 36 S. Ct. 676, 60 L. Ed. 1202; Mutual Life Ins. Co. vs. Hurni Packing Co., 260 F. 641 (C. C. A. 8); Domico vs. Met. Life Ins. Co., 191 Minn. 215, 253 N. W. 538, 541; Mack vs. Pac. Mut. Life Ins. Co., 167 Minn. 53, 208 N. W. 410, 412; Flikeid vs. N. Y. Life Ins. Co., 163 Minn. 127, 203 N. W. 598, 599." (at pp. 53-54. Emphasis supplied).

Other cases where diabetic applicants for life insurance falsely misrepresented their good health, resulting in voiding of the policies are:

Kentucky Central Life and Accident Ins. Co. vs. Lynn, 304 Ky. 416, 200 S. W. (2d) 946 (1947);

Hamby vs. American Insurance Company, 37 S. E. (2d) 217 (Ga. Ct. of Appeal, 1946);

Metropolitan Life Insurance Company vs. Kaiser, 137 N. J. Eq. 95, 43 A.(2d) 677 (1945); and

New England Mutual Life Ins. Co. v. Barnett, 39 Fed. Supp. 761 (U. S. D. C., Ala. 1941, reversed on grounds further supporting its citation here, 123 Fed. (2d) 712 (1941)).

An exhaustive collection of decisions supporting the decision herein of the United States Court of Appeals for the Fifth Circuit may be found at 131 A. L. R. at 618, et seq., and in Cooley, Briefs on the Law of Insurance, 2nd Ed., 8 Vol., (1927) at pp. 3134 and 3137.

PETITIONER'S ARGUMENTS

Questions 1 and 2 (Petitioner's brief at pp. 16, et seq.)

Petitioner cites *Valesi v. Mutual Life Ins. Co. of New York*, 151 La. 405, 91 So. 818 (1922) as authority for the proposition that under the law of Louisiana, a material misrepresentation as to the health of the insured will not avoid the policy unless the bodily condition, which was the subject of the misrepresentation, subsequently actually caused death. This is the argument upon which petitioner seriously prays for a writ of certiorari.

Respondent submits that a close examination of the case clearly distinguishes it from the case now at bar and destroys it as authority for petitioner's contentions.

The pertinent defense urged in the *Valesi* case was the alleged misstatement of the assured in his application that he had not been intoxicated during the past five years and concerning his daily consumption of wines and liquors.

Respondent submits that the decision of the Louisiana Supreme Court in the *Valesi* case was simply based upon the finding of fact that the defendant had not proved the falsity of the statements. The Court analyzed **conflicting evidence** on the question of the insured's use of liquor and concluded:

". . . if we believe those most intimately associated with the deceased, **his answers were substantially correct. There-**

fore the fraudulent purpose to deceive has not been established with that reasonable certainty necessary to vitiate the policy. The trial judge, who saw and heard the witnesses testify, so concluded, and we are unable to say he was wrong." (151 La. at p. 411)

* * *

". . . It is entirely possible that the deceased, as well as many other men of integrity and veracity in good faith might not have considered him intoxicated under the circumstances disclosed by this record. Therefore, . . . **we conclude that Valesi's answers to the questions propounded in the application for the policy were substantially correct,** and that they were, at least, not fraudulent." (at p. 412. Emphasis supplied)

It is submitted that the implication of this quoted language is that if the evidence had not been conflicting and if the Court had not found that the answers were "substantially correct," but were unquestionably false (as in the case now at bar), the Court would have found fraud as a matter of law, i.e., it would have found that the "fraudulent purpose to deceive" had been established with that "reasonable certainty necessary to vitiate the policy," and it would have vitiated the policy as in the *Lee* case, *supra*.

Respondent submits that the court, in the *Valesi* case, might easily have rested its opinion with its finding of fact that the alleged misstatements of the applicant for insurance were not false but were "substantially correct." Hence the language relied upon by the petitioner here was purely obiter dictum. The language was certainly unnecessary to the decision in view of the finding of fact clearly made.

In any event, the argument which petitioner attempts to draw from this dictum in the *Valesi* case is an absurdity. It is

unequivocally clear that Jacob Dampf made misrepresentations of fact in his application for insurance of such materiality that the respondent insurer would not have issued the policy had it known the truth. There is no word of conflicting evidence on these points. It is clear from the *Lee* case, *supra*, and the other cases cited hereinabove, that such material misrepresentations amount to fraud in law so that the policy of insurance was **invalid in its inception.** No sophistry of the petitioner can explain why he argues that the question of the validity or invalidity of an insurance contract for fraud in its inception should be affected in any way by the purely fortuitous event that the insured subsequently happened to die from some other cause. Indeed, petitioner attempts no rational explanation for the novel conclusion which he reaches. The Court of Appeals, in the instant case, accurately said:

> "The argument that the misrepresentation was immaterial because the insured died from coronary thrombosis and not from diabetes, we think begs the question. The real issue has to do with the circumstances under which the defendant assumed the risk, whether it would have assumed the risk it did assume had the truth with respect to Dampf's health been made known to it. **The cause of insured's death is not important, because the insurer would have had the right to cancel the policy if insured were still living."** (172 F. (2d) at pp. 186-187)

Having cited the *Valesi* case as authority that the settled law of Louisiana supports such an absurd conclusion, petitioner then says that the *Lee* case, *supra*, should not control here because the insured, Lee, died of Bright's Disease from which he was actually suffering at the time of making his application. (Petitioner's brief, p. 19).

Since petitioner has made this argument, respondent must again call the attention of this Court to the fact that in the *Lee* case, the insured never knew that he had Bright's Disease. His doctor and his wife conspired to keep this from him to prevent him from worrying. The policy in the *Lee* case was held invalid because of material misrepresentations of the insured that he had not had heart disease (which he did know about) and that he had not consulted doctors during the two years preceding his death. See pp. 16-20, supra.

We refer again to *Jefferson Standard Life Ins. Co. vs. Stevenson, supra*, page 13, wherein Your Honors denied certiorari to the Fifth Circuit Court of Appeals. The Court of Appeals relied upon the *Lee* case, saying,

> **"Whatever her own opinion as to whether she was suffering from a disease of the lungs might have been, her representation that she had not received medical attention within five years was untrue.** A false representation, though made in good faith, as to a matter that is material is generally held sufficient to avoid a policy of life insurance. . . . And this general rule prevails in Louisiana, where this contract of insurance was made. *Lee v. New York Life Ins. Co.*, 144 La. 445, 80 So. 652. . . ." (70 F. 2d at p. 73. Emphasis supplied)

It should also be noted that, in the *Jefferson Standard* case, a false representation that the insured had not received medical attention within a certain period was held sufficient to avoid a policy. The court did not find a false representation as to the disease of the lungs from which the insured died. It would be interesting to attempt to apply petitioner's doctrine, allegedly derived from the *Valesi* case (that death must result from the disease falsely misrepresented), to a situation where the misrepresentation was not as to any particular disease but

only as to whether or not the insured had consulted physicians within a certain period. Of what particular disease would petitioner contend that the insured must die in such a case?

Incidentally, it should be remembered that Jacob Dampf also falsely represented that he had not consulted physicians other than those named in his application. It is submitted that this misrepresentation, of a material fact, would be enough, alone and of itself, to justify the decision voiding the policy.

Question No. 3 (Petitioner's brief at page 21, et seq.)

Here petitioner contends that by reason of the directed verdict his client was denied the right of trial by jury. Respondent submits that this question was fully answered by the Circuit Court of Appeals in its decision below, viz.,

> "In the face of the evidence here, it would be straining at a gnat and swallowing a camel to admit a vestige of doubt in the conclusion that it would have been error to leave the matter to the jury. Dampf's answers, in the application for the policy, to questions relating to his health, revealed that he represented that he had no disease of the kidneys, that he had never been told that he had sugar in his urine, that he had never had diabetes, and that he had not consulted with or been treated by any physician within the previous five years. **It is uncontradicted that the insured was told by his physician that he had sugar in his urine and that he had diabetes; that he was treated therefor over a period of weeks within a very short time before making his application for insurance. The evidence, therefore, leaves no room for doubt that he not only made false answers but that he knew the answers to be false. . . .**" (172 F. 2d at p. 185. Emphasis supplied)

Respondent feels compelled to call the attention of this Court to two statements in petitioner's brief which, to say the

least, are inadequately supported by the record. At page 21 of petitioner's brief it is stated that

> "There was no evidence whatever to the effect that Mr. Dampf had ever been told, or believed, or had reason to believe that he was seriously ill. . . ."

And, at page 24, petitioner argues that Dr. Hirsch had doubt as to the diagnosis of diabetes. The record in this case (quoted at pages 5-6 of this brief) is precisely contrary to these two contentions.

Petitioner cites, at page 26 of his brief, the case of *Cunningham v. Pennsylvania Mutual Life Ins. Co.*, 152 La. 1023, 95 So. 110 (1923). There are at least three reasons why that case is without application here. **First,** the defense of fraud was held unavailable because not affirmatively raised in the pleadings (152 La. at p. 1026); **Second,** the court found good faith on the part of the insured ,who was himself a physician and an examiner for insurance companies, in failing to report a disease shown by "overwhelming proof" to be a very common complaint which caused him "to consider it not of sufficient importance to be reported in his examination" (152 La. pp. 1028-1029); **Third,** there was a conflict of evidence as to whether or not the disease involved was of such importance that the insurer would not have issued the policy knowing of it. This disputed issue of fact was resolved against the insurer primarily because the insurer's application blank did not even ask a question about the ailment from which the insured had suffered (152 La. at p. 1029). Jacob Dampf, on the contrary, falsified answers to three questions which were specifically designed to elicit from him information as to his diabetic condition and he knew positively that he was incurably af-

flicted, supra, page 6. It is obvious, therefore, that the *Cunningham* case is not applicable here.

Since petitioner has cited and quoted at length (at page 28 of his brief) from *Blackwell v. Fireside Mutual Life Ins. Co.*, 11 So. 2d 65 (La. App., 1st, 1942) respondent is compelled to point out to this Court that the decision in that case was governed by a statute (Louisiana Act 97 of 1908, as amended) which deals with the **issuance of insurance policies without physical examination.** That statute created a presumption under certain circumstances "that the company has waived its rights to claim a forfeiture on the ground that the assured did not make true and full answers in the application as to his health, . . ." The court applied this statute to the case and said that, accordingly

> ". . . the defendant company is now estopped from setting up as a defense to avoid payment of the policy the alleged misrepresentations of the insured in her application." (11 So. 2d, at pp. 67-68)

Since Louisiana Act 97 of 1908 clearly has no application here, the *Blackwell* case does not support petitioner's position. Further, even in the *Blackwell* case the court was careful to say ". . . the contract can be voided on account of fraud" (11 So. 2d at p. 70).

Question No. 4. (Petitioner's brief at page 30, et seq.)

Without extended discussion, we refer to each of the points argued by petitioner. He has lettered his arguments "a" through "f," and we refer to each by its letter.

Point "a." The case he cites, *Zumwalt v. Gardner*, 160 F.

(2d) 298 (U.S. C.C.A., 8th, 1947) does not support his proposition but merely holds that

> "As to that part of the cross-examination which clearly went beyond the limits of the subject matter covered in direct examination, the witness became defendant's own witness . . ." (160 F. (2d) at p. 303).

Point "b." Although earlier objection had been made to the admission of the death certificate "for all purposes" (Tr. 19), Dr. Nelken testified later **without objection** as to how he learned that Jacob Dampf had diabetes. Then the death certificate was introduced in connection with the testimony of Dr. Nelken and was received for all purposes **without objection.** (Tr. 86-87)

"Point "c." Since petitioner takes the liberty of presenting to this Court evidence excluded below and, in addition, evidence not even offered below, we must point out that the theory of this offering in the trial court was that "If Jacob Dampf read any of the advertisements, as presumably he did, . . " (Respondent's brief to the Court of Appeals, p. 24. See also Tr. 76) he, Dampf, would have been led to believe that diabetes was not a serious disease and that the insurance company regarded it as a minor ailment only. Respondent submits that the implication that petitioner attempts to draw from the publication of the advertisements is a *non sequitur*, as an examination of them will reveal. In any event, **the advertisements never appeared in print until after Jacob Dampf was dead**, as more fully appears from photostatic copies of the two advertisements attached hereto as Annexes "A" and "B." Unlike petitioner's photostatic exhibits of those advertisements, we have reproduced them so as to show the dates of publication.

Point "d." The testimony if allowed would have been pure hearsay, and the excluded question was purely hypothetical since there was no word of evidence that Dampf ever applied to any other insurance company. (Tr. 76-77).

Points "e" and "f." The excluded testimony was obviously immaterial and irrelevant.

CONCLUSION

Rule 38 of the Revised Rules of the Supreme Court of the United States provides, in part, that:

> "(5) A review on writ of certiorari is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. . ."

It is submitted that no such special, important or compelling reasons for review exist in this case. On the contrary, it is submitted that the decision of the two lower courts are in full accord with justice, reason, and logic and with the jurisprudence of the State of Louisiana. The position actually assumed by petitioner herein was frankly admitted to the trial court in the following language:

"The Court [speaking to petitioner's counsel]:

". . . Assuming this was fraudulent, do you mean to say that the court is called upon to perpetuate the fraud?

Mr. Hardin [Counsel for petitioner]:

"Yes, sir." (Tr. 24)

For the foregoing reasons, it is respectfully submitted that the application for a writ of certiorari to review this case should be denied.

Baton Rouge, Louisiana
May 25, 1949

Respectfully submitted,

BENJ. B. TAYLOR

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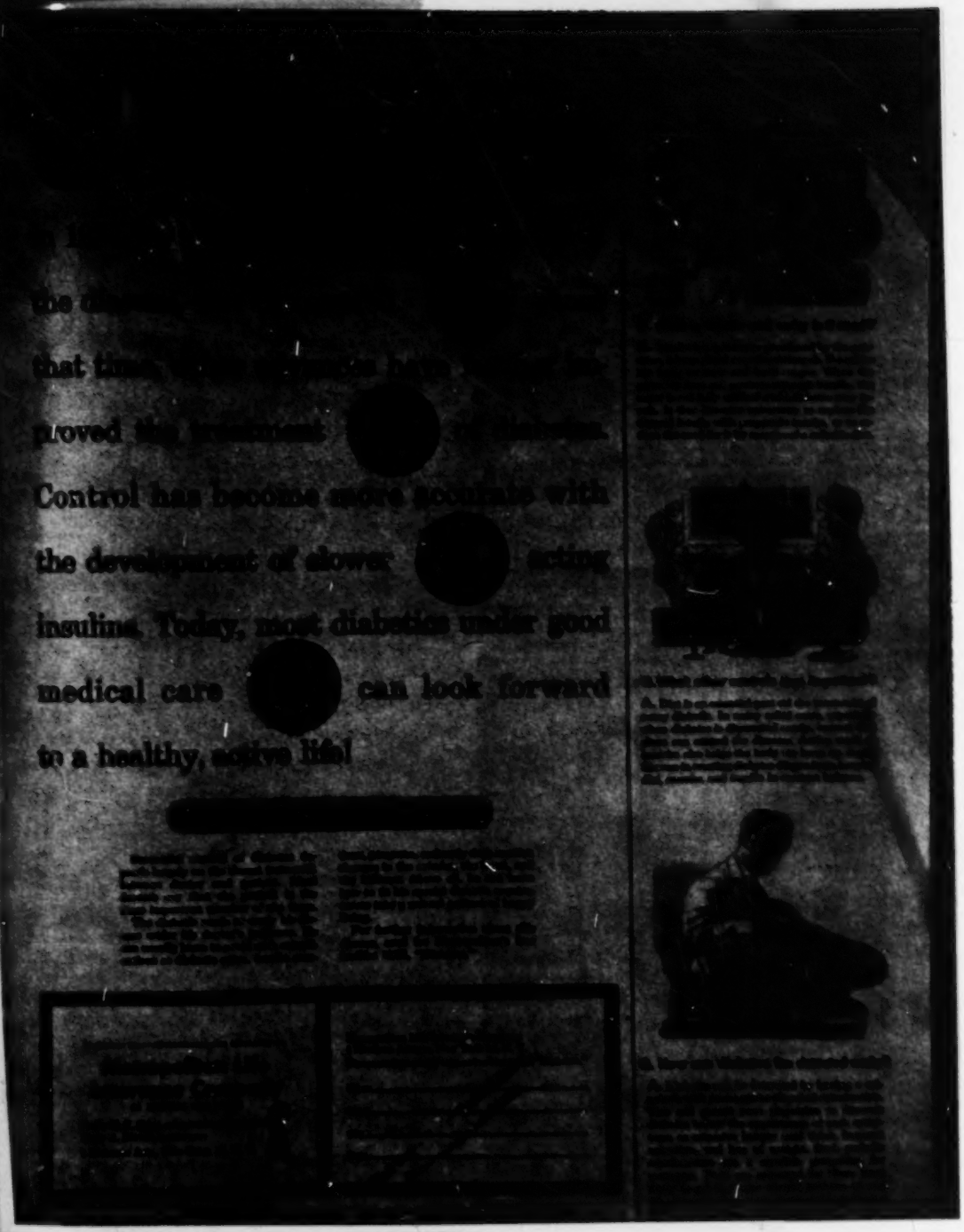
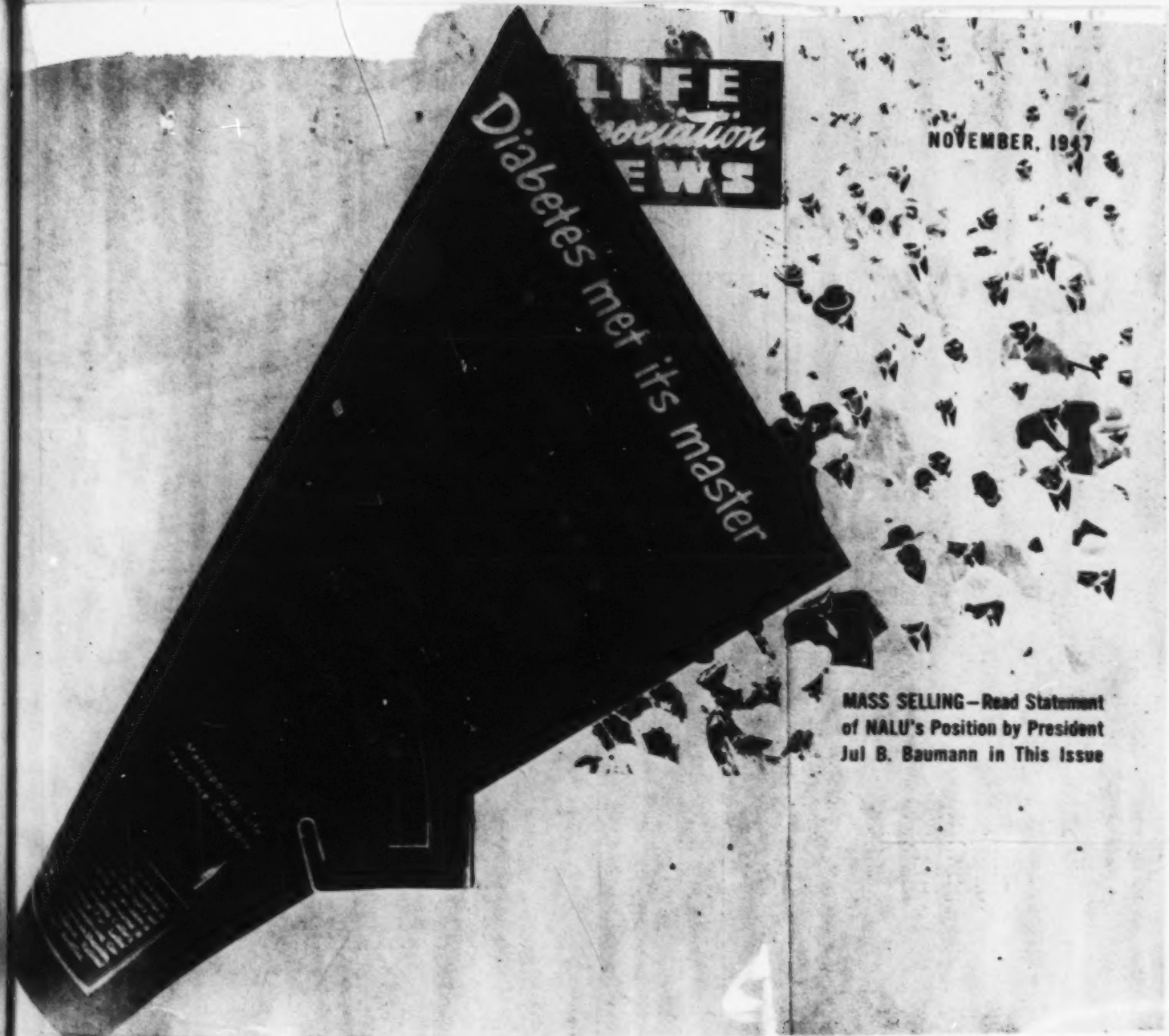


Annex "A"


LIFE
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EWS
NOVEMBER, 1947
Diabetes met its master
MASS SELLING—Read Statement
of NALU's Position by President
Jul B. Baumann in This Issue

Annex "B"